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The **Quarterly Report** provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcdowell@doe.state.in.us.

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SURVEYS AND PRIVACY RIGHTS: ANALYSIS OF STATE AND FEDERAL LAWS

Survey instruments are increasingly being employed at both the state and federal level as a means of gauging attitudes and behaviors. This information is typically used to focus resources. There is little concern where such surveys are directed at adults, but where the respondents are school-aged children, there is increasing concern over the perceived intrusion into protected or privileged areas. In short, there is the belief that such surveys are increasingly encroaching upon parental rights to direct the education and upbringing of their children.

In Indiana, one school district sought to survey its student population on adolescent health issues, but there were intimate questions involving sexuality that were included in the survey. Initially, “active consent” of parents had not been sought as the survey was intended to be voluntary and not personally identifiable. However, the school board and school administration found it necessary to postpone the survey after parents began to raise questions and concerns.¹ The school district acknowledged a need to garner more public support for the survey before it would be administered.

In another Indiana public school district, a student was administered, purportedly without parental consent, the “TeenScreen,” a mental health survey that was used by school personnel allegedly to advise the student she may have an obsessive-compulsive disorder and social anxiety disorder. The family has threatened a lawsuit. The school, which defended the survey as a means of identifying students at-risk for suicide or mental illness, indicated that it would seek written parental consent for future administrations of the survey.²

Indiana already has a law that addresses specifically surveys, personal analyses, or evaluations designed to elicit certain information from students. There is a specific exception for surveys that are “directly related to academic instruction.” This law has been “on the books” since July 1, 1995.³ It reads in its entirety as follows:

I.C. § 20-30-5-17 Access to Materials Relating to Personal Analysis, Evaluation, or Survey of Students; Consent for Participation

Sec. 17. (a) A school corporation shall make available for inspection by the parent of a student any instructional materials, including:

- (1) teachers' manuals;

¹“Monroe County Community School Corporation’s Sex Survey Delayed At Least Until Fall,” *The Herald-Times* (May 3, 2005).

²“Possible Lawsuit Looms In TeenScreen School Case,” *The South Bend Tribune* (June 9, 2005).

³P.L. 204-1995, Sec. 1, adding I.C. § 20-10.1-4-15 (now I.C. § 20-30-5-17) to the Indiana Code. This law was passed in part to address concerns of litigants who attempted to enjoin the administration of the Indiana Statewide Test of Educational Progress (ISTEP+), believing that the use of writing prompts and short essay responses would result in students revealing protected information to the state. The trial court, declining to apply the Protection of Pupil Rights Amendment (PPRA), see *infra*, found the ISTEP+ was “directly related to academic instruction” and was not designed to elicit such information.

- (2) textbooks;
- (3) films or other video materials;
- (4) tapes; and
- (5) other materials;

used in connection with a personal analysis, an evaluation, or a survey described in subsection (b).

(b) A student shall not be required to participate in a personal analysis, an evaluation, or a survey that is not directly related to academic instruction and that reveals or attempts to affect the student's attitudes, habits, traits, opinions, beliefs, or feelings concerning:

- (1) political affiliations;
- (2) religious beliefs or practices;
- (3) mental or psychological conditions that may embarrass the student or the student's family;
- (4) sexual behavior or attitudes;
- (5) illegal, antisocial, self-incriminating, or demeaning behavior;
- (6) critical appraisals of other individuals with whom the student has a close family relationship;
- (7) legally recognized privileged or confidential relationships, including a relationship with a lawyer, minister, or physician; or

(8) income (except as required by law to determine eligibility for participation in a program or for receiving financial assistance under a program); without the prior consent of the student if the student is an adult or an emancipated minor or the prior written consent of the student's parent if the student is an unemancipated minor. A parental consent form for a personal analysis, an evaluation, or a survey described in this section shall accurately reflect the contents and nature of the personal analysis, evaluation, or survey.

(c) The department and the governing body shall give parents and students notice of their rights under this section.

(d) The governing body shall enforce this section.

The use of surveys by public schools is always fraught with peril, especially where the survey was prepared by an outside entity for purposes largely unrelated to the educational function; parents were not advised of the survey in advance of its administration; the questions probed into privileged relationships, abridged constitutional rights, or revealed potential criminal activity; and parents did not have the opportunity to review the instrument itself prior to its administration.

State Law and Parent Rights

In Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005), the school did seek and obtain parental consent before administration of the survey, the survey did have an ostensible educational function, but the parents were misled as to the reported areas of inquiry and there was no indication parents had the chance to review the instrument in advance of its

administration.⁴ Notwithstanding, the eventual lawsuit by parents unhappy with the survey's inquiries into sexual matters failed.

This dispute began when a volunteer "mental health counselor" at one of the elementary schools (who was also working on her Master's Degree at the California School of Professional Psychology) developed in conjunction with the school district and other agencies a "psychological assessment questionnaire" for administration to first, third, and fifth-grade students. The announced goal was to measure children's exposure to early trauma, with violence specifically mentioned, in order to determine how this affects academic achievement. 427 F.3d at 1200.

Parents were informed of the survey and written consent was sought. At no time were parents informed that questions of a sexual nature would be asked.⁵ Parents were informed of the security measures to be employed to ensure that test results were not revealed to any unauthorized third parties. There is no indication the survey was made available for inspection by parents before its administration.

After the administration of the survey, the parents became aware of the sex-related questions and eventually filed suit, asserting two federal claims (along with state claims not addressed herein): (1) their fundamental right as parents to control the upbringing of their children, by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs; and (2) their familial right to privacy.

The school district moved for dismissal for failure to state a claim. Following a hearing on the motion, the federal district court granted the school district's motion and dismissed the federal claims, finding that the parents' privacy claim and claim of a "fundamental right" are both derived from the Fourteenth Amendment's Substantive Due Process Clause, and further finding that there is no "fundamental right" of parents to be the exclusive providers of sexual content to their children. *Id.* at 1202-03.

The parents appealed, but the 9th Circuit affirmed. The three-judge panel reviewed Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923), Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925), and their progeny, and determined these cases are designed to prevent the State from interfering with parental choices for their children but were not intended to give parents a right to compel public schools to follow their views as to what can or cannot be taught. *Id.* at 1203-06.

The 9th Circuit relied heavily upon a 1st Circuit case with the tantalizing name Brown v. Hot, Sexy & Safer Products, Inc., 68 F.3d 525 (1st Cir. 1995), where a compulsory high school sex

⁴There is no indication that California has a law similar to Indiana's provision addressing surveys, personal analyses, or evaluations.

⁵In all, the survey had 79 questions. Ten questions were of a sexual nature, but there were also questions regarding personal violence, bullying, criminal activity, abuse, suicide, and depression. See 427 F.3d at 1201.

education assembly program withstood a similar challenge. The Meyer-Pierce cases prevent the state from obstructing parents in the education of their children, which is different from parents prescribing what the state shall teach their children. “We do not think...,” the 1st Circuit wrote, “that this freedom [of parents to make decisions concerning the care, custody, and control of their children] encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.... If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school’s choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to *restrict the flow of information* in the public schools.” Brown, 68 F.3d at 533-34. Fields, 427 F.3d at 1205-06 (emphasis added by Fields court).

The 9th Circuit added that although Meyer and Pierce restrain the state from preventing parents from choosing specific educational programs for their children, this does not “afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense.” 427 F.3d at 1206.

Although the parents are legitimately concerned with the subject of sexuality, there is no constitutional reason to distinguish that concern from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District—whether those objections regard information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origins of life. Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy.

Id. Once parents choose a public school for their children to attend, the “fundamental right to control the education of their children is, at the least, substantially diminished. The constitution does not vest parents with the authority to interfere with a public school’s decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise.” Id. The Meyer-Pierce right “does not extend beyond the threshold of the school door.” Id. at 1207.

The parents’ privacy claim was “inextricably intertwined” with the Meyer-Pierce argument. As such, the failure to state a claim under Meyer-Pierce disposes of the privacy claim as well. Nevertheless, the 9th Circuit addressed the privacy issue separately. The court noted the parents were not complaining that their children were forced to reveal sensitive, private information (one of the recognized privacy rights). Rather, their argument centers on the perceived usurpation of the rights of the parents “to make important decisions regarding the manner and timing of exposing their children to sexual matters.” The survey, the court found, did not interfere with the parents’ prerogative in this regard. The parents’ right to make intimate decisions and the state’s determination of information regarding intimate matters “are two entirely different

subjects. No constitutional provision prohibits the dissemination of information to children....” Id. at 1207-08.

The court also rejected the parents’ contention that strict scrutiny should be applied. In this case, the rational basis test would be utilized. The court found that the “School District had a legitimate educational purpose in undertaking the survey,” to wit: to better understand the impediments to student learning and to improve the students’ ability to learn. The court also noted that a “legitimate educational purpose” is not solely related to curriculum. “In fine, education is not merely about teaching the basics of reading, writing, and arithmetic. Education serves higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds.” Id. at 1208-09. In this case, “[p]rotecting the mental health of children falls well within the state’s broad interest in education.” Id. at 1210.

The panel added that although it finds little difficulty in upholding the legality of the survey, “we express no view on the wisdom of posing some of the particular questions asked or of conducting an inquiry into some of the particular areas surveyed by the School District.” Id. at 1211.

Protection of Pupil Rights Amendment

Although Fields commanded everyone’s attention after the 9th Circuit issued its decision on November 2, 2005 (including almost universal negative editorial comment), it has been C.N. v. Ridgewood Board of Education, 430 F.3d 159 (3rd Cir. 2005) that has a more compelling history with regard to the use of surveys of public school students, the involvement of the Family Policy Compliance Office (FPCO), and the implications of the Protection of Pupil Rights Amendment (PPRA). Although this dispute began in 1999 (and the FPCO completed its investigation that same year), the court action dragged on till December 1, 2005, when a panel of the 3rd Circuit Court of Appeals released its decision, refining the decision of the federal district court but essentially upholding the grant of summary judgment to the school defendants.⁶

First, Some Statutory Background . . .

The PPRA, 20 U.S.C. § 1232h, 34 CFR Part 98, does not receive nearly as much attention as its statutory and regulatory neighbor, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, 34 CFR Part 99, although both are enforced by the FPCO of the U.S. Department of Education. The FPCO provides relatively little information on the PPRA at its web site, but the following is instructive:

The Protection of Pupil Rights Amendment (PPRA) is a federal law that affords certain rights to parents of minor students with regard to surveys that ask questions of a personal nature. Briefly, the law requires that schools obtain written consent from parents before minor students are required to participate in

⁶Judge Samuel A. Alito, Jr., now an Associate Justice of the U.S. Supreme Court, was a member of the panel in Ridgewood, although not the author of the decision.

any U.S. Department of Education funded survey, analysis, or evaluation that reveals information concerning the following areas:

1. Political affiliations;
2. Mental and psychological problems potentially embarrassing to the student and his/her family;
3. Sex behavior and attitudes;
4. Illegal, anti-social, self-incriminating and demeaning behavior;
5. Critical appraisals of other individuals with whom respondents have close family relationships;
6. Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
7. Religious practices, affiliations, or beliefs of the student or student's parent*; or
8. Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program.)

The No Child Left Behind Act of 2001 contains a major amendment to PPRA that gives parents more rights with regard to the surveying of minor students, the collection of information from students for marketing purposes, and certain non-emergency medical examinations. Also, an additional category of information (*) was added to the law.⁷

The NCLB amendments occurred in 2002, well after the Ridgewood dispute began but in partial response to this dispute.⁸

And Now To The Case . . .

In the fall of 1999, Ridgewood, a New Jersey school district, administered to over 2,000 of its middle and high school students a survey entitled “Profiles of Student Life: Attitudes and Behaviors.” The survey was designed to be voluntary and anonymous, with results released only in the aggregate with no identifying student information. It sought information about drug and alcohol use, sexual activity, physical violence, suicide attempts, personal relationships and associations (including familial relationships), and student views on matters of public interest.

The genesis for the survey began in 1998 with the Human Resources Coordinating Council (HRCC), a local public-private group that saw a need to focus public and private resources to better address the needs of local youth. The more effective means to assess the needs, attitudes, and behavior patterns of local youth would be to survey the youth while students were in

⁷See <http://www.ed.gov/policy/gen/guid/fpco/ppra/parents.html>. The NCLB reference is to Sec. 1061, **Student Privacy, Parental Access to Information, and Administration of Certain Physical Examinations to Minors**, amending 20 U.S.C. § 1232h (PPRA).

⁸See “The Protection of the Pupil Rights Act,” **Quarterly Report** October-December: 2002.

attendance at their local middle and high schools. A survey prepared by an out-of-state entity was purchased using federal education funds.⁹ Both the HRCC and school officials attempted to publicize the survey and stress that it was to be voluntary and anonymous. However, the communications were inexact in many crucial respects: the exact dates of the administration of the survey were never detailed; parental consent was never sought; parents were not informed as to how to “opt out” their children from the surveys; school personnel who were in-serviced on the survey administration demonstrated some confusion as to the voluntariness of the survey; and the survey administration itself was similar to a test administration, militating against a perception of voluntariness. The survey was made available for parental inspection prior to its administration, and the survey administration did ensure anonymity, with the responses destroyed after the aggregate report was compiled. 430 F.3d at 161, 162-69.

Three students and their mothers sued the school board and certain school officials, asserting the survey was not voluntary and did not ensure anonymity, purportedly in violation of FERPA and PPRA, as well as certain constitutional provisions related, *inter alia*, to compelled speech, rights of privacy, and parental rights. The federal district court denied injunctive relief (to prevent the release of the survey results) and granted summary judgment to the school defendants. The 3rd Circuit reversed in part and remanded, especially as the federal district court had ruled prior to any discovery. There remained unresolved issues of material fact. Following discovery and dismissal of the FERPA and PPRA claims, the federal district court (different judge) granted the school defendants’ Motion for Summary Judgment. It is this latter decision the 3rd Circuit refined but affirmed in this decision. *Id.* at 161, 170-73.

The FERPA and PPRA claims were withdrawn after the U.S. Supreme Court decided Gonzaga University v. Doe, 536 U.S. 273, 122 S. Ct. 2268 (2002), where the court determined that due to FERPA’s enforcement scheme, no private right of action existed. Gonzaga did not implicate the PPRA, but the parties interpreted Gonzaga’s reasoning as applying to the PPRA as well.¹⁰ The 3rd Circuit merely noted this agreement of the parties rather than endorse it. *Id.* at 170-71, *n.* 13.

Meanwhile, the FPCO received seven (7) other complaints about the survey and initiated an investigation. The FPCO issued its report on December 18, 1999, finding the school district had violated the PPRA because—despite the school’s assertion—the totality of the circumstances indicated the school district did *require* students to participate in the survey, thus triggering the need for prior parental consent. The school district had to ensure its procedures complied with the PPRA. *Id.* at 171, *n.* 14; at 172, *n.* 16.

With FERPA and PPRA out of the way, the federal courts keyed on the purported constitutional violations. The federal district court found the survey was both voluntary and anonymous. The

⁹The particulars of the survey can be found beginning at p. 17 of the Slip Opinion, including the use of fictitious choices to ensure validity and reliability of responses.

¹⁰Both FERPA, 20 U.S.C. § 1232g(f), (g), and the PPRA, 20 U.S.C. § 1232h(e), (f), contain similar enforcement language. As noted *supra*, the FPCO is the designated entity for enforcing both FERPA and PPRA.

3rd Circuit, however, found the survey may very well have been involuntary (in apparent agreement with the FPCO's investigation report) but agreed the survey was sufficiently anonymous and confidential so as to defeat any claim of a constitutional violation. As to the voluntary nature of the participation in the survey, the 3rd Circuit pointed to the lack of critical communication with parents (especially with respect to any "opt out" opportunities) as well as the 100 percent participation rate of students in grades 7-12. One student who was absent was required "to make it up" on the day he returned to school. There was also a coercive atmosphere when the survey was actually administered that suggested mandatory participation. *Id.* at 173-76.

Although the school board intended for the survey to be voluntary, the "lack of attention to some key details" defeated this intent, thus rendering the survey, for summary judgment purposes, involuntary. *Id.* at 176-77.

Notwithstanding the involuntary nature of the survey, the record did support the federal district court's determination that the survey was anonymous and its results confidential. Only one plaintiff stated there was a "sticker" on the survey similar to the one that would be found on a standard test. No one else corroborated the existence of a sticker. Teachers did not read student responses and did not suggest answers. There was no evidence that the anonymity of the survey was compromised either during the actual administration or afterwards when the results were tabulated, a report made, and the survey responses destroyed. *Id.* at 177.

Right to Privacy

The 3rd Circuit turned its attention to the constitutional issues. It noted that the U.S. Constitution "does not mention an explicit right to privacy" nor has the "United States Supreme Court...ever proclaimed that such a generalized right exists." The Supreme Court has, however, recognized that certain "zones of privacy" exist in the amendments to the Constitution. *Id.* at 38. One such "right to privacy" would protect from disclosure personal matters and similar intimate facts concerning one's life (such as medical information). This right extends to minors as well. The right is not absolute and may have to give way to public health concerns or similar justifications. Courts, in deciding whether an intrusion into an individual's privacy is justified, must weigh the following factors:

- The type of record requested;
- The information it might or might not contain;
- The potential for harm in any subsequent non-consensual disclosure;
- The injury from disclosure to the relationship in which the record was generated;
- The adequacy of safeguards to prevent unauthorized disclosure;
- The degree of need for access; and
- Whether there is an express statutory mandate, articulated public policy, or other recognizable public interest supporting such access.

Id. at 178-80.

This dispute can be distinguished from other cases where a disclosure-based privacy violation occurred. With respect to the survey, even assuming its involuntary administration, there was no

actual information that would permit the identity of an individual and connect the individual's identity to otherwise private information (such as responses to sexual activity, familial relationships, criminal activity, suicidal inclinations, and the like). "[W]hile the privacy expectation is great, the privacy side of the balance is nonetheless lessened because disclosure of personal information occurred only in the aggregate and personal information was adequately safeguarded."¹¹ *Id.* at 180-81.

Parental Rights

Although the Supreme Court has recognized a fundamental right of parents to make decisions concerning the care, custody, and control of their children,¹² the "Supreme Court has never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education. It is clear, however, that the right is neither absolute nor unqualified." Under some circumstances, "the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." *Id.* at 182.

The 3rd Circuit concluded "that even if the survey was involuntary, the conduct at issue does not rise to the level of a constitutional violation." Although the parents' complaints that consent was not obtained prior to administration of the survey and there was insufficient information as to how a parent could "opt out" the parent's child from participation, "[i]t does not necessarily follow...that the survey violated the Constitution."¹³ The facts in this case—whether to permit participation in a survey of this type—"is not a matter of comparable gravity" when compared to the cases where the *Meyer-Pierce* cases are applied. *Id.* at 184-85. Although the survey did expose students to "sensitive topics" before a parent would have addressed these issues, "the survey in this case did not intrude on parental decision-making authority..." The parent and child remain "free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials." The administration of the survey by the school did not "indoctrinate[] the students in any particular outlook on these sensitive topics; at most, they may have introduced a few topics unknown to certain individuals.

¹¹The court did recognize that some statistical information could make a student's identity "easily traceable" and thus "personally identifiable" under some circumstances, but this was not the case in this matter, especially given the confidentiality exercised in the administration of the survey, the collection and storage of the results, the tabulation of the results and ultimate destruction of the responses, and the public disclosure of the results only in the aggregate. *Id.* at 181, *n.* 25. For a case addressing the potential for statistical data revealing "personally identifiable information" with respect to students, see *Fish, et al. v. Dallas Independent School District*, 170 S.W.3d 226 (Tex. App. 2005).

¹²See *Meyer v. Nebraska*, 262 U.S. 390, 401, 42 S. Ct. 625 (1923) (right to control education of one's children), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571 (1925) (right to direct upbringing and education of one's children), and their progeny (no pun intended).

¹³The 3rd Circuit did note that, in response to this dispute, the New Jersey legislature passed a state version of the PPRA called the "Protection of Pupil Rights" law, which became effective January 1, 2001. *Id.* at 185.

We thus conclude that the survey's interference with parental decision-making authority did not amount to a constitutional violation."¹⁴ *Id.* at 185.

Compelled Speech

Although the First Amendment's free-speech clause would also protect one's right "to refrain from speaking at all," this right "is necessarily different in the public school setting." The free speech rights of public school students are not "automatically coextensive with the rights of adults in other settings."¹⁵ Consequently, "First Amendment jurisprudence recognizes that the educational process itself may sometimes require a state actor to force a student to speak when the student would rather refrain." Examples would include classroom assignments and curricular requirements, such as writing or speaking on a specific topic where the student prefers a different topic. *Id.* at 186-88.

"The Supreme Court has only ever found a violation of the First Amendment right against compelled speech in the context of forced speech that requires the private speaker to embrace a particular government-favored message." *Id.* at 188. The 3rd Circuit assumed for the purpose of analysis that answering survey questions is a form of "speech." Based on this assumption, the court could not find that there was any "compulsion" that would violate the students' First Amendment rights. There were no threatened sanctions should a student fail to complete the survey. The only "compulsion" centered on requiring students to sit in chairs and put pen to paper. No one was threatened or actually punished for failure to complete the survey. Students were likewise not compelled to disclose private information because the format of the survey "did not permit individualized detection. We can find no authority to suggest that merely requesting such highly generalized information or releasing it in the aggregate violates the Constitution." *Id.* at 189-90.

Summary judgment for the school defendants was affirmed. *Id.* at 190.

"INTELLIGENT DESIGN": COURT FINDS ORIGIN SPECIOUS

On December 20, 2005, the federal District Court for the Middle District of Pennsylvania ruled that the Dover Area School District's policy requiring the teaching of "Intelligent Design" in the

¹⁴The 3rd Circuit was quick to distinguish its holding from the 9th Circuit's recent decision in *Fields, supra*, which involved a survey of much-younger students on similar "sensitive topics" for which parents were somewhat misled. The *Fields* decision, as noted, as been generally criticized, a fact the 3rd Circuit panel was keenly aware of. *Id.* at 185, *n.* 26.

¹⁵See *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266, 108 S. Ct. 562 (1988) (First Amendment rights applied in light of the "special characteristics" of the school environment); and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159 (1986) (First Amendment rights of students in public school setting may not always mirror constitutional protections in other settings).

high school biology classes violated the Establishment Clause of the First Amendment.¹⁶ Kitzmiller, et al. v. Dover Area School District, 400 F.Supp.2d 707 (M.D. Pa. 2005). This is only the latest in a decades-old battle waged by adherents of a particular religious view of the creation of life who oppose Darwin's theory on the origin of species.¹⁷

Although the famous prosecution of high school science teacher John T. Scopes for teaching evolution occurred eighty years ago in Dayton, Tennessee, the conflict between the teaching of the theory of evolution and the literal Biblical application of the account of instantaneous creation of man in Genesis (creationism or creation science) continues in both judicial and legislative arenas. Lately, the opposition has repackaged itself under "Intelligent Design" (ID) arguing that the "irreducible complexity" of certain organisms and phenomena, coupled with the inability of evolution to explain currently how this may have occurred, leads to a conclusion that there is an "intelligent designer," who may be God but could also be a space alien or time-traveling cell biologist.¹⁸ Scopes was a 24-year-old science teacher with Darwinian views who agreed to be the nominal plaintiff in a test case to challenge the Butler Act, a public law passed by the Tennessee legislature in February of 1925, making it unlawful for a teacher in any school supported by state funds "to teach any theory that denies the story of divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." This became the so-called "Monkey Trial" and is remembered more for the clash between

¹⁶"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

¹⁷Prior to the court's decision in Kitzmiller, there had been considerable maneuvering in several states. In the aftermath, however, the discussion has been muted. In Indiana, several legislators expressed interest in requiring the teaching of "Intelligent Design" along with evolution in the public schools. Public response was not supportive, however, and no bill was proposed during the 2006 legislative session. See "GOP Lawmakers Want Schools To Teach 'Intelligent Design,'" *The Indianapolis Star* (November 3, 2005). A bill was introduced in the Utah legislature, but failed on a 46-28 vote in the House of Representatives. "Anti-Darwin Bill Fails In Utah," *The New York Times* (February 28, 2006). The Kansas State Board of Education is embroiled in a similar controversy, albeit one of its own making. See "Kansas Evolution Debate Becomes War of Words," *Associated Press Dispatch* (May 6, 2005) and "Scientists Boycott Kansas Evolution Hearings," *Associated Press Dispatch* (May 8, 2005). In Ohio, the State Board of Education reversed, by an 11-4 vote, its previous requirement that sophomore biology classes include a critical analysis of evolution that was based on "Intelligent Design" principles. The Ohio State Board was reacting to the Kitzmiller decision. "Ohio Board Undoes Stand On Evolution," *The New York Times* (February 15, 2006). In Georgia, the Cobb County Board of Education has appealed to the 11th Circuit Court of Appeals an adverse decision requiring it to remove stickers critical of the theory of evolution from its science textbooks. See Selman v. Cobb Co. Board of Education, 390 F.Supp.2d 1286 (N.D. Ga. 2005) under "Theory of Evolution" (Update), **Quarterly Report** January-March: 2005. Please consult the Cumulative Index for past articles on this topic.

¹⁸This is not a facetious statement. See Kitzmiller, et al. v. Dover Area School District, 400 F.Supp.2d at 718. The proponents of Intelligent Design (ID) will typically not state definitively that the "intelligent designer" is God—or, more directly, the Christian concept of God—to avoid being labeled as a religious concept rather than a scientific one. As will be noted, this strategy failed.

William Jennings Bryan and Clarence Darrow.¹⁹ The “Monkey Trial” was high on drama but short on legal effect. The Butler Act, although never again enforced, remained “on the books” until repealed in 1967. In 1968 the U.S. Supreme Court, in Epperson v. Arkansas (see *infra*), struck down a similar anti-evolution law in Arkansas. At that time, only Arkansas and Mississippi had anti-evolution laws.

Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968) involved a 1928 law based on the Butler Act. The court noted, “The Arkansas statute was an adaptation of the famous ‘monkey law’ which that State adopted in 1925.” Epperson was a biology teacher in Little Rock who challenged the constitutionality of the law. The Supreme Court, with many direct references to the *Scopes* trial, noted that there was no record of any prosecution of a teacher under the Arkansas law. “It is possible that the statute is presently more of a curiosity than a vital fact of life...” 393 U.S. at 102. Nevertheless, the court had to rule.

[T]he law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

Id. at 103. The Court added that it was not prohibiting the study of religions or the Bible “from a literary and historic viewpoint, presented objectively as part of a secular program of education...” Id. at 106. However, Arkansas’ law “was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, [as] literally read [by fundamentalist sectarians].” Id. at 108-109.²⁰

¹⁹H.L. Mencken, covering the trial for *The Baltimore Sun*, coined the term “Monkey Trial” to describe the July 1925 events in Dayton, Tennessee. The trial is also well known because of Inherit the Wind, a 1955 stage play and later a movie by Jerome Lawrence and Robert Lee.

²⁰The court was careful in crafting its language so as not to identify any particular religion in the body of the opinion while at the same time indicating there is no unanimity of opinion regarding instantaneous creation (sometimes referred to in ID as “abrupt appearance”) within any religion. Ironically, in the *Scopes* trial, William Jennings Bryan held himself out as an expert on the King James version of the Bible and actually testified as to his belief in the literal account of creation. Upon cross-examination, however, he admitted he did not think the earth was created in six 24-hour days, which undermined the literalism that was the cornerstone of Fundamentalist doctrine underlying the Butler Act. Many early Christian writers indicated that the “days” in the Genesis account weren’t solar days, especially since the sun wasn’t created until the fourth “day.” The use of poetic and figurative language, according to theologians, is a method of revealing truth in a variety of ways. See, e.g., St. Augustine’s fifth century work, *De Genesi ad Litteram*.

Despite an attempt to carefully select its words, the court's opinion could be read as either (1) balancing evolutionary theory with all other theories, including creationism; or (2) proscribing instruction on any theory regarding our origins. The legislative tactics changed. Opponents of evolution urged passage of laws that provided "balanced treatment" where the theory of evolution would be taught. The "balanced treatment" would include the teaching of creationism alongside evolution, creating what one court described as "contrived dualism," where any criticism of evolution would be viewed as support for creationism.

In Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573 (1987), the U.S. Supreme Court found unconstitutional, as in Epperson, Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act." Known informally as "the Creationism Act," the law forbade the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." No school was required to teach evolution or creationism. The court found that "creationism" is a religious belief, and the legislature's attempt "to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism" fails the three-pronged Establishment Clause test established by Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971) (see *infra*) because the law does not serve a solely secular purpose, it advances a religious belief, and it excessively entangles government with religion. The Court added at 482 U.S. 595, 107 S. Ct. 2583:

[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.

The court also made reference to McLean v. Arkansas Board of Education, 529 F.Supp. 1255 (E.D. Ark. 1982), which at 1258-1264 has a historical review of contemporary antagonisms between the theory of evolution and religious movements, tracing the history of the current opposition to a 19th century fundamentalist movement that believes the theory of evolution is atheistic in that it does not acknowledge God as creator. The Kitzmiller court relied heavily upon McLean for the history of this movement, which today has evolved into ID.

Dover Area School District

The Dover Area School District has 3,700 students with 1,000 of these students attending the high school. It is governed by a nine-member Board of Directors (hereinafter, the Board). The genesis for this dispute began in January of 2002 shortly after Alan Bonsell joined the Board. At a school board retreat, Bonsell identified as his number one issue the instituting of the teaching of "creationism" into the science curriculum, with his number two issue the resurrection of "school prayer." Bonsell had indicated that he did not believe in evolution, and that he wanted creationism taught side-by-side with evolution in the biology class. Bonsell would later disclaim in the lawsuit any interest in creationism, a tactic the court found "incredible," adding that

“Bonsell repeatedly failed to testify in a truthful manner about this and other subjects.” 400 F.Supp.2d at 748-49.

A series of discussions ensued between Bonsell and school administrators (and later with the high school science teachers). Bonsell stated he did not want the teachers providing instruction that would contravene what parents would present to their children at home, giving the students the impression that “somebody is lying.” The teachers rejoined that instruction involved “emphasis upon the origin of species, not origin of life.” This apparently was not sufficient for Bonsell at the time, “because the concept of common ancestry offends his personal religious belief that God created man and other species in the forms they now exist and that the earth is only thousands of years old.” *Id.* at 749-50.

This meeting in the fall of 2003 was the first such meeting that had occurred with the science teachers. The meeting did have a somewhat chilling effect on the way the teachers broached the subject of evolution. As will be noted *infra*, the relationship between the teachers and the Board would become considerably more strained.

Bonsell was not alone in this pursuit. Another Board member, William Buckingham, was as directly and intimately involved in the “balanced treatment” initiative. Buckingham had several conversations with organizations that promote ID. The thrust of these conversations was to receive legal advice and materials relative to ID. The science teachers were required to view a videotape from one of these organizations, and later attorneys from the organization made a legal presentation to the Board in executive session. *Id.* at 750. The Board, during this period, delayed approval for a biology textbook. During two Board meetings in June of 2004, Board members “spoke openly in favor of teaching creationism and disparaged the theory of evolution on religious grounds.” *Id.* at 750-51. Buckingham complained the biology textbook was “laced with Darwinism” and urged the purchase of a textbook that could balance creationism with evolution. The court also found Buckingham’s testimony during the lawsuit to be less than forthright. “With surprising candor considering his otherwise largely inconsistent and incredible testimony, Buckingham did admit that he made this statement.” *Id.* at 751. Bonsell also stated that there are only two theories that can be taught, creationism and evolution. Buckingham testified that “the separation of church and state is a myth” and that “[t]his country wasn’t founded on Muslim beliefs or evolution. This country was founded on Christianity, and our students should be taught as such.” *Id.*²¹ Buckingham also exhorted those in attendance at the Board meeting to “trace your roots to the monkey you came from,” while lamenting that “liberals in black robes”²² were “taking away the rights of Christians.” *Id.* at 105.²³ Buckingham

²¹Buckingham’s wife also spoke at one of the June 2004 Board meetings, during which she castigated evolution as “nothing but lies” and supplemented her speech with scriptural references, asserting that the theory of evolution “violated the teachings of the Bible.” Buckingham said “amen” at the end of her speech. *Id.* at 751-52.

²²It is not surprising Buckingham would attempt to distance himself from this remark once he was actually before a judge. Judge John E. Jones III, the author of this opinion, was very much aware that his decision finding ID was not science but was a religious view would result in similar disparaging remarks about him. “Those who disagree with our holding will likely mark it as the product of an activist judge.

maintained pressure on the science teachers, including through the Board's Curriculum Committee, where the teachers were required to view materials and textbooks and encouraged to incorporate the materials into their instruction. Earlier, an evolution mural was taken from a classroom and destroyed. Buckingham had a picture of the evolution mural. When questioned where he had obtained the picture, he was evasive but responded otherwise: "I gleefully watched it burn." Later, Buckingham "demanded that the *teachers agree that there would never again be a mural depicting evolution in any of the classrooms and in exchange Buckingham would agree to support the purchase of the biology textbook in need by the students.*" *Id.* at 752-53 (emphasis original). Buckingham did not keep his word, however. Later, when the Board considered the purchase of the biology text, he objected, stating he would not support its purchase unless the Board also purchased as a "supplemental" text a book entitled Of Pandas and People (hereinafter, **Pandas**). *Id.* at 754.

Pandas is a publication of yet another organization that supports creationism and ID. It is a religious, Christian organization. It was written by professed creationists. **Pandas** has undergone several drafts. Prior to the Supreme Court's decision in Edwards v. Aguillard, *supra*, the book was a creationist text. However, after Edwards, words referring to "creationism" were merely replaced by ID references, but the content of the book did not change. *Id.* at 721-22.

After the June 2004 Board meetings, Buckingham contacted a legal advocacy group that supported ID. This group offered to represent the Board, which it did. The Board's actual attorney cautioned the Board against the direction it was taking—instituting an ID policy—especially as the religious underpinnings of the purported secular rationale—improved science instruction, critical thinking by students—would likely fail in the face of a legal challenge. *Id.* at 754-55. Notwithstanding, the Board Curriculum Committee met with the school personnel four days later to discuss how **Pandas** would be used in the classroom. The teachers, by this time, "were both weary from the extended contention concerning the teaching of evolution, and wary of retribution in the event they persisted in opposing Buckingham and his cohorts on the Board." *Id.* at 755.

Sixty (60) copies of **Pandas** were presented to the school district. Neither Bonsell nor Buckingham admitted to the source of this contribution and, in fact, deliberately misled those inquiring as to the source. It was later revealed that Buckingham took up a collection at his church (\$850.00), while Bonsell's father operated as the conduit for the surreptitious purchase of the books. "[T]he inescapable truth is that both Bonsell and Buckingham lied...about their knowledge of the source of the donation for **Pandas**.... This mendacity was a clear and

If so, they will have erred as this is manifestly not an activist Court. Rather, this case came to us as the result of the activism of an ill-informed faction on a school board, aided by a national public interest law firm eager to find a constitutional test case on ID, who in combination drove the Board to adopt an imprudent and ultimately unconstitutional policy." *Id.* at 765. Judge Jones assumed his position on the federal bench on August 2, 2002. He is a Republican and was appointed by President George W. Bush.

²³Bonsell and Buckingham attempted to deny some of the statements attributed to them, but the "great weight of the evidence" indicated "that these witnesses either testified inconsistently, or lied outright under oath on several occasions..." *Id.* at 752.

deliberate attempt to hide the source of the donations by the Board President [Buckingham] and the Chair of the Curriculum Committee [Bonsell] to further ensure that Dover students received a creationist alternative to Darwin's theory of evolution. We are accordingly presented with further compelling evidence that Bonsell and Buckingham sought to conceal the blatantly religious purpose behind the ID Policy." Id. at 755-56.

Matters came to a head in October of 2004. The Board's Curriculum Committee met early in the month to discuss changing the biology curriculum but did not invite the science teachers to participate. Bonsell proposed a change to the curriculum to address the theory of evolution. His statement, which was approved, provided: "Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution, including but not limited to intelligent design." The Board's Curriculum Committee also called for **Pandas** to be cited as a reference text. Later in the month, by a 6-3 vote, the Board adopted a resolution to change the biology curriculum:

Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught.

Id. at 756-57. The subject is to be addressed in "lecture form with **Pandas** to be a reference book." The science teachers were not consulted. The Board procedures for consideration and adoption of the resolution departed significantly from the Board's typical procedures for conducting such business. There was no discussion of ID,²⁴ no discussion how this would improve science education, and no justification by any Board member for this curriculum change. Id. at 757-58.²⁵ The teachers felt they had compromised enough and balked at any further accommodation of the Board's proposals. They would not support **Pandas** and would not teach what is essentially "creationism." Id. at 758. The teachers refused to read a disclaimer to the students that was prepared by the Board, forcing administrators to actually read the statement. Id. at 726-27, 761. The Board's four-paragraph statement, which followed rejection of several versions presented by school personnel, read in its entirety as follows:

The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.

²⁴The court noted that several members who voted for the resolution demonstrated a "shocking ignorance concerning the concept of ID...with utterly no grasp of ID," with one member consistently referring to it as "intelligence design." Id. at 758-59, 760.

²⁵The superintendent and assistant superintendent both opposed the change. Two Board members who voted against it resigned from the Board, with one complaining that she had had her reputation impugned by others who questioned her personal and religious beliefs, while the other Board member indicated that, in addition, he had had his patriotism challenged because of his opposition to the ID Policy. Id. at 759-60.

Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, *Of Pandas and People*, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

Id. at 708-09, 761.²⁶ Considerable controversy had been stirred up in the community. The Board, in February of 2005, sent to each household a "specialized newsletter" developed in conjunction with the legal advocacy group that the court described as "an aggressive advocacy piece denigrating the scientific theory of evolution while advocating ID." The newsletter demeaned any opponents and accused scientists of engaging in "trickery and doublespeak about the theory of evolution." The newsletter represents ID as a "scientific theory on par with evolution" but one that "differs from Darwin's view." The newsletter also suggested that "evolution has atheistic implications." *Id.* at 730-31, 762. Meanwhile, the two newspapers in the area printed over 225 Letters to the Editor as well as 62 editorials on the controversy from the period of June 1, 2004, through September 1, 2005.

Plaintiffs filed their lawsuit in December of 2004, asserting violation of the First Amendment's Establishment Clause. Plaintiffs also raised similar claims under Pennsylvania's constitution.

The Legal Framework: The *Lemon* Test and the *Endorsement* Test

Judge John E. Jones III presided over 21 days of testimony during a six-week period. He issued his 139-page decision on December 20, 2005, finding that Dover's ID Policy was unconstitutional.

The parties agreed that the three-prong test derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105 (1971) would apply. *Id.* at 712. A government-sponsored message will violate the Establishment Clause if the message does any one of the following: (1) it does not have a secular purpose ("purpose" prong); (2) its principal or primary effect advances or inhibits religion ("effect" prong); or (3) it creates an excessive entanglement of the government with religion ("excessive entanglement" prong). Plaintiffs believe the ID Policy violated the first two prongs (Purpose and Effect). They did not argue there was excessive entanglement. *Id.* at 746.

²⁶This statement coupled with the resolution constitute the Board's "ID Policy."

The “purpose prong” looks to whether government’s actual purpose is to endorse or disapprove of religion. Although the Board’s stated secular purpose was to improve instruction in science and promote critical thinking, the ID Policy—especially when considered in light of its legislative history, its context, and the comments and actions of Board members who supported it—promotes a religious viewpoint, that is, to promote ID, a version of creationism, while denigrating evolution. *Id.* at 746-47. The legislative history, the historical context, and the disclaimer itself “inevitably lead to the conclusion that Defendants consciously chose to change Dover’s biology curriculum to advance religion,” in this case, “to advance creationism, an inherently religious view, both by introducing it directly under the label ID and by disparaging the scientific theory of evolution, so that creationism would gain credence by default as the only apparent alternative to evolution[.]” *Id.* at 747. Bonsell’s early advocacy on behalf of creationism and Buckingham’s later actions, including his contacts with ID advocacy groups and his campaign of intimidation directed toward school personnel and opponents, indicate the proffered secular purpose was not sincere but was, rather, a sham. The Board, in its revision of the biology curriculum, consulted no scientific materials, no scientists, no scientific organizations, and, in fact, did not even consult its own science teachers. “The Board relied solely on legal advice from two organizations with demonstrably religious, cultural, and legal missions...” In addition, several Board members who voted in favor of the biology curriculum change did not know—and still do not know—precisely what ID is. “To assert a secular purpose against this backdrop is ludicrous.” In addition, the consistent campaign of deceit by Bonsell and Buckingham (and other ID supporters) “constitutes additional strong evidence of improper purpose under the first prong of the Lemon test.” The “thought leaders” on the Board “made it their considered purpose to inject some form of creationism into the science classrooms, and by the dint of their personalities and persistence, they were able to pull the majority of the Board along in their collective wake.” The court added: “The Defendants’ previously referenced flagrant and insulting falsehoods to the Court provide sufficient and compelling evidence for us to deduce that any allegedly secular purposes that have been offered in support of the ID Policy are equally insincere.” The stated secular purposes “amount to a pretext for the Board’s real purpose, which was to promote religion in the public school classroom, in violation of the Establishment Clause.” *Id.* at 748-63.

Although a violation of any one prong under Lemon’s three-prong analysis is sufficient to find a government message unconstitutional, the court also addressed the Effect Prong. Under the Effect Prong, the government action “may not be overtly hostile to religion[,] but also...it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling non-adherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.” *Id.* at 763-64, quoting Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9, 109 S. Ct. 890 (1989) (plurality opinion).

Because “ID is not science, the conclusion is inescapable that the only real effect of the ID Policy is the advancement of religion.” *Id.* at 764. The disclaimer that was read to the students bolstered an alternative religious theory while insinuating that evolution is a problematic theory, even within the scientific community. The direct implication is that the Board approves of the religious principles contained in the disclaimer specifically and ID Policy. *Id.*

Endorsement Test

The federal courts have acknowledged that Lemon's analysis is not always adequate when a court is confronted with a First Amendment dispute. The Endorsement Test, which is "a gloss on Lemon that encompasses both the purpose and effect prongs," grew out of County of Allegheny v. ACLU, 492 U.S. 573, 109 S. Ct. 3086 (1989), a dispute over a religious display on government property. This test is not restricted to a narrow set of circumstances where government and religion or religious organizations are involved, as argued by the Board, but extends as well to religion within a public school setting. Id. at 712, 714 (with collected Supreme Court cases).

The Endorsement Test recognizes that "when government transgresses the limits of neutrality and acts in ways that show religious favoritism or sponsorship, it violates the Establishment Clause." Id. at 714.

The test consists of the reviewing court determining what message a challenged governmental policy or enactment conveys to a reasonable, objective observer who knows the policy's language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose.

Id. at 714-15. This "informed citizen" is "more knowledgeable than the average passerby." Id. at 715. This "reasonable, objective observer" is also capable of "glean[ing] other relevant facts" from the "face of the policy in light of its context." Id. (citations omitted). This "hypothetical construct" would have to be applied twice: once to the reasonable, objective student; once to the reasonable, objective member of the Dover community. Id. at 715-16.

The history of ID is intertwined with the strategy "to weaken education of evolution by focusing students on alleged gaps in the theory of evolution..." Id. at 716. Its roots are distinctively religious and emanate from a particular religious view that includes the literal creation of the world as described in Genesis. ID and its antecedents initially sought to prevent the teaching of evolution, but as case law developed, so did its strategies, including the promulgation of "balanced treatment" laws and then the "cloaking [of] religious beliefs in scientific-sounding language and then mandating that schools teach the resulting 'creation science' or 'scientific creationism' as an alternative to evolution." Id. at 716-17. "Creation science" relies upon a "contrived dualism" that presents only "two possible explanations for life, the scientific theory of evolution and biblical creationism," treating "the two as mutually exclusive such that 'one must either accept the literal interpretation of Genesis or else believe in the godless system of evolution' and accordingly viewed any critiques of evolution as evidence that necessarily supported biblical creationism." Id. at 717, quoting McLean v. Arkansas Board of Education, 529 F.Supp. 1255, 1266 (E.D. Ark. 1982). The McLean court found creationism "is simply not science" because it depends upon "supernatural intervention," which cannot be explained by natural causes or be proven through empirical investigation, and, consequently, is neither testable nor falsifiable. Id.; McLean, 529 F.Supp. at 1267.

Although ID came into existence after the Supreme Court decided *Edwards v. Aguillard*, *supra* (which found in relevant part that belief in a supernatural creator is inherently a religious view), “the religious nature of ID would be readily apparent to an objective observer, adult or child.” *Id.* at 718. Although ID’s “official position” does not state that the “intelligent designer” is God, there is a strong suggestion that this “master intellect” is a “supernatural deity” rather than “any intelligent actor known to exist in the natural world.” *Id.* “In fact, [this is supported by] an explicit concession that the intelligent designer works outside the laws of nature and science and a direct reference to religion in **Pandas**’ rhetorical statement, ‘what kind of intelligent agent was it [the designer]’ and answer: ‘On its own[,] science cannot answer this question. It must leave it to religion and philosophy.’” *Id.* at 719.²⁷

It is notable that not one defense expert was able to explain how the supernatural action suggested by ID could be anything other than an inherently religious proposition. Accordingly, we find that ID’s religious nature would be further evident to our objective observer because it directly involves a supernatural designer.

Id. at 721. The “reasonable observer” would also recognize “that ID is a form of creationism.... The evidence at trial demonstrates that ID is nothing less than the progeny of creationism.” This determination is particularly bolstered by the drafting and publication history of **Pandas**. *Id.* at 721-22.

A reasonable, objective student would recognize the administration’s reading of the Board’s disclaimer “as a strong official endorsement of religion” by the Board. *Id.* at 723-24, 727. The drafting of the four-paragraph statement further bolsters this determination: (1) the Board singled out the theory of evolution for a curriculum change without addressing any other aspect of the biology curriculum; (2) the first paragraph directly addresses but disavows the theory of evolution by indicating to students they have to learn this because they will be tested on it, yet no other disclaimer is associated with any other aspect of the curriculum that is also mandated and also will be included in assessment; (3) the second paragraph disparages evolution by relying upon a misleading use of the word “theory” so as to suggest evolution is an “opinion” or a “hunch”; (4) students are told that evolutionary theory has “gaps” that exist such that students should consider it as “unreliable...or on shaky ground”; (5) the third paragraph “contrasts ID with ‘Darwin’s view’” and directs students to consult **Pandas** as though it were a scientific text, with ID promoted as an alternative “explanation” as opposed to a “theory,” a form of “contrived dualism” that is a creationist tactic with “no scientific factual basis or legitimate educational purpose”; and (6) the fourth paragraph is particularly misleading as it encourages students to “keep an open mind and explore alternatives to evolution” but “it offers no scientific alternative” other than an inherently religious one (ID). *Id.* at 724-726 (emphasis original). From this, a

²⁷There is also discussion by the court of the so-called “Wedge Document” and its accompanying “Wedge Strategy” as applied by ID proponents. The Wedge Document envisions a five-year plan to replace science as currently taught with a “theistic and Christian science.” *Id.* at 719-20. The “Wedge Strategy” consists of a three-phase implementation of the Wedge Document, with Phase III involving “cultural confrontation and renewal.” *Id.* at 737, *n.* 14.

reasonable, objective student would conclude the Board's favored view is a religious one. Id. at 726-29.

The reasonable, objective adult observer is not necessarily a member of the Board's targeted audience (the school community). Rather, this would include the "broader listening audience" whom the Board brought into the mix through its public discourse, through its Board meetings, and through its mass mailing of its February 2005 newsletter to all members of the Dover community rather than the adults who had students in the school system. The newsletter was an especially "aggressive advocacy piece" that denigrated the scientific theory of evolution, attacked opponents, and promoted an inherently religious viewpoint. "[T]he February 2005 newsletter was an astonishing propaganda discourse which succeeded in advising the few individuals who were by that time not aware that a firestorm had erupted over ID in Dover." Id. at 729-31. The significant amount of Letters to Editor and editorials published during this period also indicated significant public interest in the matter. Id. at 732-33. Further, the vast majority of these letters indicated the public at large viewed this as involving religion. Id. at 733-34. "[T]he community collectively perceives the ID Policy as favoring a particular religious view." Id. at 734.

An objective adult member of the Dover community would also be presumed to know that ID and teaching about supposed gaps and problems in evolutionary theory are creationist religious strategies that evolved from earlier forms of creationism, as we previously detailed. The objective observer is therefore aware of the social context in which the ID Policy arose and considered in light of this history, the challenged ID Policy constitutes an endorsement of a religious view[.]

Id. at 731, 734. The court provided a detailed explanation as to why ID is not a "science" because it invokes and permits "supernatural causation," which is untestable; its use of "irreducible complexity" has the same "flawed and illogical contrived dualism that doomed creation science," especially as science has refuted ID's arguments with respect to such areas as bacterial flagellum, the blood-clotting cascade, and the immune system; and ID's negative attacks on evolution have been refuted by the scientific community. It is also noteworthy, the court added, that ID has not gained acceptance in the scientific community, has not generated peer-reviewed publications, and has not been the subject of testing and research. Id. at 734-43.

ID is reliant upon forces acting outside of the natural world, forces that we cannot see, replicate, control or test, which have produced changes in the world. While we take no position on whether such forces exist, they are simply not testable by scientific means and therefore cannot qualify as part of the scientific process or as a scientific theory.

Id. at 742-43. The court lamented that "students, parents, and teachers of the Dover Area School District [were] dragged into this legal maelstrom, with its resulting utter waste of monetary and personal resources." Id. at 765. The court found the Board's actions violated the Establishment Clause and permanently enjoined the Board from maintaining the ID Policy. The Board may not

require teachers to denigrate the theory of evolution or refer to “a religious, alternative theory known as ID.” *Id.* at 766.

Post-Script

During the trial in this matter, eight members of the Board were up for re-election. All eight lost to a slate of candidates opposed to the ID Policy. Among one of the losing incumbents was Alan Bonsell. Of the 16 candidates, he received the fewest votes.²⁸ The new school board will not appeal Judge Jones’ decision. At its board meeting of January 3, 2006, the Board also officially rescinded the ID Policy.²⁹

COURT JESTERS: DISORDERLY CONDUCT

The irrepressible Mae West, commenting on her 1926 trial in a New York City courtroom for writing and starring in her play *SEX* (for which she was found guilty of objectionable conduct, sentenced to ten days in jail, and fined \$500), wrote: “I enjoyed the courtroom as just another stage—but not so amusing as Broadway.”³⁰

Courtrooms, of course, aren’t supposed to be stages. When a courtroom is turned into one, strange things can occur. It is doubtful, though, that anything stranger has occurred than what transpired in 1939 in an Ohio courtroom during a jury trial over purported alienation of affections.

The unintended production would never have come to light had not an aggrieved party appealed to the Ohio Court of Appeals. In *Fry v. Lebold*, 31 N.E.2d 257 (Ohio App. 1939), an obviously dismayed appellate court could scarcely believe what it was reading.

With painstaking care we have read the *scena* presented, consisting of nine hundred and thirty-four pages. We use this term in view of the definition given by Webster as an “accompanied dramatic recitative interspersed with passages of melody.” And we use it advisedly, since the authors of the production submitted for our consideration seem to have acted on the theory that,

“All the world’s a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts.”³¹

²⁸“Evolution Slate Outpolls Rivals,” *New York Times* (November 9, 2005).

²⁹“School Board Rescinds ‘Intelligent Design’ Policy,” *Associated Press* (January 3, 2006).

³⁰Mae West (1892-1980), *Goodness Had Nothing To Do With It*, Chapter 7 (1959).

³¹The Court of Appeals was quoting Shakespeare’s *As You Like It*, Act II, Scene vii.

31 N.E.2d at 257-58. The resulting description of attorney misconduct during the jury trial is unrivaled by any fictional account that could be contrived.

There are but few pages in this record free from reports of altercation. It would appear that two, three and four lawyers were talking more or less continually, injecting comments, making facetious remarks, paying but little attention to the rulings of the trial judge.

Certainly this turning of a lawsuit into an opéra bouffe is to be criticized severely, but, in the absence of a showing that the rights of a litigant were affected adversely, we are not disposed to disturb the judgment.

Id. at 258. The Court of Appeals could not resist an elaboration.

Mr. Walter Ruff played many parts. He bewailed his fate in tragic manner not unworthy of King Lear. Imitating Mazeppa,³² he lashed his soul naked to the wild horse of his fervid imagination. In the final act, he interspersed the melody, and assumed the role of leading tenor in light opera, singing to the jury and to the spectators.

Mr. Arthur Limbach, laying aside for the nonce the duties imposed upon a statesman, exhibited histrionic ability of no mean order.

Counsel for appellant, presented facetiously as the Mills Brothers,³³ took the part of the chorus in Greek drama, and, beholding what passed in the acts of the tragedy, expressed vociferously the sentiments evoked by the passing events.

Id. But there is always an Act III to any production, and the Court of Appeals was determined there would be no encores for the *dramatis personae*.

It is true that tragedy and comedy were somewhat confused, and at times all the leading actors sought a hearing simultaneously.

The whole performance might well rival Mr. Eugene O'Neill's "Strange Interlude," which for weirdness in conception and duration of execution amazed all who saw and heard it.

³²Ivan Mazeppa (1640-1709) is a famous (or infamous, in some eyes) Cossack leader who has been the subject of many literary and musical works, including Lord Byron's poem "Mazeppa" (also one by Victor Hugo) and a not-too-flattering opera by P.I. Tchaikovsky.

³³The Mills Brothers, originally from Piqua, Ohio, were popular during the 1920s for their vocal blending, broadcasting regionally from WLW in Cincinnati. In 1930, CBS signed them to a three-year contract for a national radio show. They remained popular into the 1960s.

The play is ended. The actors who failed to receive the curtain calls seek a return engagement. We are not disposed to book it.

Id. at 259. Everyone's a critic . . .

QUOTABLE . . .

Fact is often stranger than fiction because most writers of fiction try to make their stories plausible.

Judge Richard A. Posner, Kijonka v. Seitzinger, et al., 363 F.3d 645, 646 (7th Cir. 2004).

UPDATES

The "Parent" in the Unconventional Family

In Re: The Parentage of A.B., 818 N.E.2d 126 (Ind. App. 2004) was discussed at length in **Quarterly Report** October-December: 2004. This case involved two women who arranged a domestic relationship. They even decided to raise a child together. To this end, the brother of one of the women donated sperm to impregnate the other so that the resulting child would be genetically related to both women. Following the birth of A.B., the one woman filed a petition to adopt, with the birth mother's consent. However, the relationship soured while the adoption petition was pending. The birth mother withdrew her consent to the adoption. Although the couple reconciled for a time, the adoption process was never completed. The couple eventually ceased to exist as a domestic couple. The birth mother refused visitation and support payments from the other, which resulted in legal action by the other, seeking a declaration that she should be considered the legal second parent of A.B. The trial court, noting that Indiana law recognizes four (4) sources of parentage,³⁴ none of which was implicated in this case, found the lack of adoption—the only avenue available to the other woman—militated against judgment in her favor. She appealed. The Indiana Court of Appeals reversed and remanded to the trial court, noting that it could find "no legitimate reason...to provide children born to lesbian parents through the use of reproductive technology with less security and protection than that given to children born to heterosexual parents through artificial insemination." 818 N.E.2d at 131.

The birth mother sought transfer to the Indiana Supreme Court, which granted the request, vacating the opinion of the Court of Appeals.

³⁴The four (4) types are (1) children resulting from heterosexual marriages; (2) children resulting from biological paternity; (3) children resulting from "the limited circumstance of children conceived by artificial fertilization within a marital relationship with the assistance of any anonymous semen donor"; and (4) children who are adopted. 818 N.E.2d at 129.

In In Re: Parentage of A.B., 837 N.E.2d 965 (Ind. 2005), a majority of the court (this was a 4-1 decision) chose its words carefully. The majority opinion noted the trial court's vehicle for dismissal—pursuant to Trial Rule 12(B)(6) for failure to state a claim upon which relief may be granted—and then reviewed pertinent case-law constructions of the trial rule, noting that dismissals under Trial Rule 12(B)(6) are “rarely appropriate.” They concluded such a dismissal was not appropriate in this case for the following reasons:

1. Indiana courts have authority to determine whether to place a child with a person other than the natural parent, which necessarily includes the authority to determine whether such a person has the rights and obligations of a parent; and
2. Indiana law provides a measure of protection for the rights of the natural parent, but it also embodies innumerable social, psychological, cultural, and biological considerations that significantly benefit the child and serve the child's best interests.

Trial courts can exercise deference in their determinations as to children's best interests in these circumstances. At least some of the relief sought in the A.B. case may be within the discretion of the trial court to grant. The majority pointedly noted that it was not deciding any other matter and would not comment further on the issues involved. It vacated the Court of Appeals' decision, but it also reversed the trial court and remanded the matter to the trial court for further proceedings.

Justice Brent E. Dickson dissented, warning that the majority opinion disregards the prerogative of the birth mother under Indiana's adoption laws, encourages others who are not natural parents to use declaratory judgment actions to bypass adoption laws, and advances special policy interests that have not become well established changes in society.

It appears likely A.B. will have a return engagement.

Cheerleading Safety: Chants of a Lifetime

As reported in **Quarterly Report** July-September: 2005, the Indiana General Assembly, through I.C. § 20-19-2-8(a)(10), has directed the Indiana State Board of Education to establish and enforce standards and guidelines for cheerleading activities.³⁵ National reports indicate increased incidences of serious injury occurring to cheerleaders, especially as routines become more complicated and athletic. A 15-member advisory committee was established to review the current status of cheerleading and to recommend rules—including training requirements—for employment in Indiana. The State Board, at its March 2, 2006, meeting, approved for public discourse the following Proposed Rules.

Cheerleading Safety Rules

³⁵P. L. 65-2005.

Proposed Rule: 511 IAC 6.1-2-7 Safety of Students Participating in Cheerleading Activities

Authority: IC 20-19-2-8; IC 20-31-4-17

Affected: IC 20-31-4-1

Sec. 7. (a) “Cheerleading activities” means activities associated with leading or directing the cheering of student and adult fans in support of the interscholastic athletics and activities programs of a public or accredited nonpublic school. The term includes:

1. Camps.
2. Clinics.
3. Competitions.
4. Leading or directing cheering at interscholastic events.
5. Performances.
6. Practices.
7. Training.

(b) The National Federation of State High School Association Spirit Rules are adopted.

(c) In addition to the National Federation of State High School Association Spirit Rules, cheerleading activities are subject to all of the following:

- (1) Cheerleading activities may not occur during moratorium periods established for athletes under Indiana High School Athletic Association rules.
- (2) Students must have an annual medical examination and medical approval, as required of athletes under Indiana High School Athletic Association rules, before participating in cheerleading activities.
- (3) Cheerleading activities may occur only under the direct supervision of a coach or sponsor who has completed safety certification approved by the department [Department of Education].
- (4) Stunts may be performed only under the direct supervision of a coach or sponsor who has completed stunting certification approved by the department.
- (5) At least one (1) coach or sponsor from every school must attend an annual rules interpretation workshop approved by the department.
- (6) If it is not possible to have a physician or athletic trainer at games and practice sessions, emergency procedures must be defined. The emergency procedure must be in writing and available to staff and cheerleaders and include, but not be limited to, provisions for CPR, first aid, and obtaining medical assistance and transportation.

- (7) Cheerleaders who experience or show signs of trauma or other injury must receive appropriate treatment and obtain a release from the treatment provider before resuming activities.
- (8) Schools must investigate and document all injuries and reported violations of rules.
- (9) Appropriate safety mats shall be used in practices until skills are mastered.
- (10) Basket tosses are prohibited.
- (11) “Double downs” are prohibited.
- (12) Parents must consent to participation of their children in cheerleading activities.
- (13) Cheerleaders must be exposed to proper conditioning programs and trained in proper stunting and spotting techniques.
- (14) Middle and elementary school cheerleading activities must be appropriate to the age, ability, and skill level of the students.

(d) The department [Department of Education] shall do the following:

- (1) Develop lists of approved training and certification programs for coaches and sponsors.
- (2) Determine the schedule under which coaches and sponsors shall participate in training and certification programs, including renewal requirements.
- (3) Determine experiences that may substitute for approved training and certification programs.
- (4) Prescribe the format for record keeping and reporting under this rule.

I.C. § 20-19-2-8(a)(10) not only requires the establishment of standards but their enforcement as well. By placing the Cheerleading Safety Rules in 511 IAC 6.1-2, these rules become a part of the Health and Safety Requirements for accreditation purposes. Failure to abide by the rules can affect a public or nonpublic school’s accreditation.

Under **Proposed Rule** 511 IAC 6.1-2-7(c)(10), (11), two cheerleading routines would be prohibited: the “basket toss” (illustrated below) and the “double down” (a type of dismount). Indiana is not alone in reviewing and restricting some stunts because of the increase in injuries, said to have doubled since 1990. Recently the American Association of Cheerleading Coaches and Administrators (AACCA) banned tall pyramids and some forms of cheerleader tossing without mats after a cheerleader for Southern Illinois University lost her balance and fell on her

head from a 15-foot pyramid during a basketball game. She suffered a concussion and cracked vertebra in her neck, but her injuries were not life-threatening. She was released from the hospital.

The AACCA said its new rules—which apply only to basketball games because of the hardwood floors and cramped spaces—are an attempt to prevent such incidents in the future.³⁶ Cheering has changed over the past 20 years to include male performers, highly competitive national and world championships, and intensive training regimens.³⁷

Brenda Jamerson, the cheerleading coach for Pendleton Heights High School and a member of the Advisory Committee, attributes the increase in injuries to a lack of training, especially for coaches. She hopes the rules will lead to trained, knowledgeable, experienced coaches working with these young athletes.³⁸

The National Federation of State High School Associations (NFHS), whose “Spirit Rules” the State Board intends to adopt (see **Proposed Rule 511 IAC 6.1-2-7(b)**, *supra*), has restricted performance of multi-base tosses, including the “basket toss,” to appropriate mats, grass, rubberized and soft yielding surfaces, effective with the 2006-2007 school year.³⁹ The more visible change will occur during basketball games, where the stunt would require an appropriate mat. The NFHS cited to the recent action by AACCA as impetus for this change to NFHS’s “Spirit Rules.”

The National Collegiate Athletic Association (NCAA) has followed AACCA’s lead, prohibiting performance of certain pyramids and the basket toss without the use of mats. This ban was in effect for the remainder of the 2006 basketball season, including the Men’s and Women’s “Final Four” championship rounds.⁴⁰ A decision whether this ban will be permanent will be decided at a later date when the AACCA’s rules committee reviews the matter. The NCAA requires cheerleading squads to conform to the AACCA Cheerleading Safety Guidelines.

³⁶“Rules Aimed At Increasing Safety,” *Associated Press Dispatch* (March 11, 2006).

³⁷“New Rules Ban Dangerous Cheerleading Stunts,” *Associated Press Dispatch* (March 13, 2006).

³⁸“Give Me An ‘S’ For Safety,” *Anderson Herald Bulletin* (February 7, 2006).

³⁹“Basket Tosses Limited to Soft Surfaces in High School Cheerleading,” NFHS News Release (March 16, 2006).

⁴⁰“NCAA Prohibits Selected Cheerleading Stunts During NCAA Division I, II, and III Men’s and Women’s Basketball Championships,” NCAA News Release (March 10, 2006).

(Cheerleaders demonstrate the basket toss. Photographs are provided courtesy of the National Federation of State High School Associations.)



Date: April 17, 2006

/s/Kevin C. McDowell
Kevin C. McDowell, General Counsel
Indiana Department of Education

The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at www.doe.state.in.us/legal/.

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